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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EARL MCCARVEY,

Defendant and Appellant.

B208693

(Los Angeles County  
Super. Ct. No. BA290499)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
George Gonzalez Lomeli, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant  
Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General,  
for Plaintiff and Respondent.

James Earl McCarvey appeals from the judgment entered following resentencing. Previously he was convicted of attempted robbery (Pen. Code, §§ 664/211) and found to have suffered three prior serious felony convictions within the meaning of Penal Code section 667, subdivision (a)(1), three prior serious or violent convictions within the meaning of the “Three Strikes” law (Pen. Code, §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)) and to have served three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).<sup>1</sup> The court declined to exercise its discretion pursuant to Penal Code section 1385 to strike any of the convictions for purposes of the Three Strikes law but struck all prior convictions for purposes of Penal Code sections 667, subdivision (a) and 667.5, subdivision (b). On appeal we rejected appellant’s claims of judicial misconduct and abuse of discretion in allowing the prosecution to reopen its case but found that the trial court had imposed an unauthorized sentence. We observed the trial court had erred by failing to impose three mandatory five-year enhancements pursuant to Penal Code section 667, subdivision (a) and reversed appellant’s sentence. We stated it was unclear whether the trial court would have stricken the prior convictions for purposes of the Three Strikes law had it known it could not strike them for purposes of section 667, subdivision (a) and directed the trial court to reconsider appellant’s *Romero*<sup>2</sup> motion on remand.

At resentencing, the court imposed an additional 15 years pursuant to Penal Code section 667, subdivision (a)(1), five years for each prior, for a total sentence of 25 years to life plus 15 years. Appellant now claims he must be afforded another *Romero* hearing because in resentencing appellant “to 40 years to life, the trial court failed to exercise an

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<sup>1</sup> The information alleged he had six prior serious or violent felony convictions within the meaning of the Three Strikes law, six prior serious felony convictions within the meaning of Penal Code section 667, subdivision (a)(1), and had served six prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Apparently, at the trial court’s suggestion that the prosecution need not prove every prior for purposes of the Three Strikes law, the prosecution chose to prove just three.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

informed sentencing discretion, in violation of his federal constitutional right to due process.” Appellant also claims he was denied effective assistance of counsel at the resentencing hearing when trial counsel made no argument as to why the trial court should not impose a Three Strike sentence. For reasons stated in the opinion, we affirm the judgment.

### **FACTUAL AND PROCEDURAL HISTORY**

As we previously observed in our opinion filed August 29, 2007, in case number B193983, “[o]n September 19, 2005, appellant crossed paths with Wendell Rich in a park. Rich tried to avoid appellant, but appellant stepped in front of him. Appellant smiled and punched Rich in the ribs. When Rich fell to the ground in pain, appellant jumped on his back. [¶] While holding Rich down, appellant hit him on the head six to eight times. Appellant pulled out a badge, put it to Rich’s face and proclaimed, ““this is my beat.”” Appellant threw Rich’s hat in the park and either went through Rich’s pockets himself or demanded that Rich empty his pockets. Appellant emptied Rich’s backpack and rifled through the contents, although he did not actually take anything from Rich. Appellant then approached another person and went through the contents of that person’s pockets.”

At resentencing, the court observed it had “received a remittitur from the Court of Appeal on this matter, and it is basically a remittitur directing this court that [appellant] be resentenced, at least his sentence be adjusted in a manner consistent with the Court of Appeal decision of August 29, 2007, in that appellant is to receive [five] additional years for each 667(a) Penal Code five-year prior . . . for an additional 15 years. Therefore, and the court really has no discretion other than to follow the Court of Appeal decision. [¶] The defendant shall be resentenced as follows: He originally received 25 years to life, so on top of that, he is to receive an additional 15 years for the three 667(a) convictions. [¶] In view of the defendant’s criminal history and convictions, the court is not inclined to exercise its discretion under *Romero*. [¶] The court had originally, I believe, struck the 667(a) priors. The Court of Appeal basically said that the court should not have done that

and has ordered that this court impose that. [¶] In all other respects, the verdict has been fully affirmed.”

Defense counsel argued that “the strikes were very, very old, in fact one being 32 years old, one 27 years old, and the other one 21 years old, and that would have taken care of three of the strikes, being so remote in time.” The court responded it had “looked at the age of those cases. And you’ve stated, as well, even if I exercise my discretion with respect to those, he still is left with three strikes. . . . and so it’s all for naught, because it would require me to strike all of the strikes in order to deviate from the [Three] Strikes sentencing scheme.”<sup>3</sup>

## DISCUSSION

### I

Contrary to appellant’s claim, the trial court did not fail to exercise its informed sentencing discretion. “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony

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<sup>3</sup> Pursuant to appellant’s request and Evidence Code section 452, subdivision (d) we have taken judicial notice of the record in the first appeal.

At the first hearing, in ruling on appellant’s *Romero* motion to strike the strikes, the court stated, “Unfortunately, because of the number of strikes the defendant has suffered previously, aside from the strikes that have just been established – because this court is making a finding that, based on the totality of the evidence contained in what’s been marked as People’s 1, and that, as I stated, will reflect the conviction of the three charges – the defendant has also suffered other strikes, for a 459 [burglary], on April 5, 1974, case number A392184; for another robbery, June 14, 1985, case number A767931; and a 245(a) [assault with a deadly weapon or by means of force likely to produce great bodily injury], on June 26, 1979, case number A3473 – excuse me – 436. That is one of the factors that the court considers in exercising its discretion under *Romero*. [¶] Based on his prior convictions and based on the current conviction for . . . attempted robbery which the jury found to be true, the court is not inclined to exercise its discretion and will not strike the strikes in question.”

convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A court's failure or refusal to dismiss or strike a prior conviction allegation under Penal Code section 1385 is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] Second, a ““decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376-377.) Our review of the record indicates the trial court understood it had been directed by this court to reconsider appellant's *Romero* motion in light of his new sentence and exercised its discretion not to strike any prior strike convictions. The court's decision was neither irrational nor arbitrary.

## II

Appellant's claim he was denied effective assistance of counsel is without merit. “The standard for showing ineffective assistance of counsel is well settled. ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in

the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206-207.) As the record here sheds no light on why counsel acted or failed to act in the manner challenged, the claim must be rejected. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Additionally, even if we were to assume that counsel's representation was inadequate, appellant's claim would fail. The trial court indicated that in view of appellant's criminal history and convictions, it was not inclined to exercise its discretion under *Romero*. It is not reasonably probable that had counsel argued otherwise the outcome would have been different. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

**DISPOSITION**

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.